86-295

No. ———

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v.

WALTER T. SMITH,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth and Fourteenth Amendments of the United States Constitution would require a Pennsylvania State Fire Marshal to obtain a search warrant to enter, search and seize evidence from a fire damaged house after twelve (12) hours had elapsed from the time the fire was extinguished?

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OPINIONS BELOW

Upon agreement and after briefs were submitted, the Pennsylvania Supreme Court issued three opinions, i.e., majority, concurring, and dissenting opinions which are printed and made a party hereof as Appendices B, C, D, pages 3a, 16a, 21a.

The Supreme Court of Pennsylvania by Order dated January 28, 1985, granted the Petitioner's Petition for Allowance of Appeal. This Petition for Allowance of Appeal was granted from the Order and Opinion of the Superior Court of Pennsylvania reversing the judgment of the Court of Common Pleas of Susquehanna County by an Order dated August 15, 1984. The Opinions of the Pennsylvania Superior Court, majority and dissenting, are printed and made a part hereof as Appendices F, G, pages 32a, 40a.

The Court of Common Pleas of Susquehanna County after a Suppression Hearing filed an Opinion and an Order dated October 14, 1982, suppressing certain evidence taken from Petitioner's house twelve hours after a fire had been extinguished. This Order and Opinion are Appended hereto as Appendices H, I, pages 43a, 44a.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on June 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS

The Constitutional provisions which the above entitled Petition involves are as follows:

Constitution of the United States, Amendment 4:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no Warrants shall issue but upon probable cause, supported, by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Constitution of the United States, Amendment 14:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

STATEMENT OF FACTS

At or about 8:00 p.m., on June 28, 1982, the State Police Fire Marshal, Trooper Cobb, arrived at the scene of a burning residential structure belonging to the Petitioner, Walter T. Smith, and his wife. The structure was located in the Borough of Great Bend, Susquehanna County, Pennsylvania. The Fire Marshal arrived at the scene of the blaze on his own accord in the capacity of an observer. While on the scene, and at or about 8:30 p.m., the local Fire Chief communicated to Trooper Cobb that the fire was of a suspicious origin, the power was shut off, and there was nothing in the home that would have caused the fire (R. 19a-20a). As a result thereof, the Fire Chief formally requested of Trooper Cobb that an investigation be conducted.

The fire was suppressed somewhere between 9:00 and 9:30 p.m. on the same evening. Despite evidence to the contrary, Trooper Cobb stated that he didn't enter the structure at that time and decided to return the next day. The next day Trooper Cobb arrived at the general scene around 9:00 a.m., on July 29, 1982. When he arrived at the scene, neither the Petitioner nor his wife were present. Although the windows and doors of the Petitioner's structure were not boarded, the home still contained all of the Petitioner's personal belongings, as well as those of his family. Somewhere between 9:00 a.m. and 10:00 a.m., the Fire Marshal made a warrantless and non-consensual entry into the Petitioner's home for the purpose of taking

photographs and removing samples therein. While Officer Cobb was in the building, the Petitioner, Co-owner, Walter T. Smith, appeared and offered, at that time, to assist Trooper Cobb in his investigation.

As a result of the evidence obtained, the Petitioner was charged with the crimes of arson (18 Pa. C.S.A. 3301 (b) (2) and (3)) and risking a catastrophe (18 Pa. C.S.A. 3302 (b)).

Prior to trial, the Petitioner, by and through his Attorneys, moved to suppress the photographs and material taken from the structure, alleging that the Fire Marshal's warrantless entry violated the Petitioner's Fourth Amendment rights. After a hearing on the motion, the Honorable Donald O'Malley, President Judge of Susquehanna County, granted the motion to suppress. It was from this decision that the Commonwealth took and perfected a timely appeal.

After reviewing the facts and circumstances of this case, the Superior Court, in a split two (2) to one (1) decision, reversed the Trial Court's decision and remanded this case for further proceedings. It was from the Superior Court's decision that the Petitioner, by and through his respective Counsel, filed a timely petition for allowance of appeal to the Supreme Court of Pennsylvania. After consideration of same, the Supreme Court granted the Petitioner's motion and the case now appears before the Pennsylvania Supreme Court for disposition.

Upon oral argument and written briefs, the Pennsylvania Supreme Court had written and issued three (3) opinions, i.e., a majority, concurring, and dissenting opinion, with the result of having affirmed the Superior Court of Pennsylvania.

It is important to note that the dissenting opinion has footnoted on the first page thereof that when that opinion was circulated it was proposed as a majority opinion.

REASON FOR GRANTING WRIT

Warrantless searches in the absence of exigent circumstances should never supercede the right of the people to be secure in their houses and that any evidence so seized should be suppressed.

As a general rule, a search or seizure of evidence without a warrant is deemed unreasonable for constitutional purposes. *Coolidge v. New Hampshire,* 403 U.S. 433, 454, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971); *Commonwealth v. Holzer,* 480 Pa. 93, 389 A.2d 101 (1978). However, the reality of law enforcement and crime prevention has shown that, where exigent circumstances exist, this warrant requirement is excused. *United States v. Velasquez,* 626 F.2d 314 (3rd Cir. 1980); *Commonwealth v. Holzer,* supra. These emergency-like circumstances occur where the need for prompt police action is imperative, either because evidence is likely to be destroyed or because there exists a threat of physical harm to police officers or to other innocent bystanders. *United States v. Velasquez,* supra; *Commonwealth v. Hinkson,* 315 Pa. Superior Ct. 23, 461 A.2d 616 (1983).

Any inquiry to determine whether exigent circumstances exist involves a balancing of the individual's right to be free from unreasonable intrusions with the interest of society in investigating crime quickly and adequately and preventing the disappearance of evidence necessary to convict criminals. *United States v. Rubin,* 474 F.2d 262

(3rd Cir., 1973), cert. denied 414 U.S. 833, 94 S.Ct. 173, 38 L.Ed. 2d 68 (1973); *United States v. Hayes,* 518 F.2d 675 (6th Cir., 1975). This balancing test requires an examination of all of the surrounding circumstances in a particular case. *Commonwealth v. Harris,* 429 Pa. 215, 239 A.2d 290 (1966).

This area is not new to the U.S. Supreme Court. Resolution of these issues have been made in *Michigan v. Tyler,* 436 U.S. 499, 92 S.Ct. 1941, 56 L.Ed. 2d 486 (1978) and again in *Michigan v. Clifford,* 104 S.Ct. 641, 78 L.Ed. 2d 477 (1984).

The facts in *State of Michigan v. Tyler et al.,* supra, are clearly distinguishable from the case at bar. In *Tyler,* a suspicious fire broke out on January 21, 1970, in the early morning hours and was extinguished at approximately 4:00 a.m. on that same morning. Police and fire officials re-entered the fire scene at 9:00 a.m. some four (4) to five (5) hours after the fire had been extinguished, and, during this entry, removed evidence later used at the trial of the Petitioners. In the case at bar, a period of twelve (12) hours had expired before the State Police Fire Marshal had re-entered the structure.

A review of the Pennsylvania Supreme Court's decision in this case before this Honorable Court will reveal that the Court decided the issue relying primarily on the "continuation of exigent circumstances" theory as pronounced in the case of *Michigan v. Tyler et al.,* supra. The Court concluded in this case, that the warrantless search of the Fire Marshal, some twelve (12) hours after extinguishment of the fire, was based simply on "continuation" of exigent circumstances which had existed at the time of the fire and shortly thereafter.

Reason for Granting Writ

Not only in the investigation of arson cases, but in all areas of criminal investigations, the law in the area of search and seizure has clearly held that a law enforcement officer need not secure a warrant if he can establish that exigent circumstances existed at the time of the search. In arson type cases, or simply cases involving burning structures, the exigency of the situation is based on the need to suppress the fire and, of course, correspondingly, to determine its respective origin. Despite the existence of any exigent circumstances, we must all realize that this exigency must, at some time, end. It was the case of *Michigan v. Tyler et al.*, supra, which initially gave us some guidance in determining when the exigency in arson type cases shall cease so as to require a search warrant before making entry for investigative purposes.

Unlike *Tyler,* in *Michigan v. Clifford,* supra, we are dealing with a private dwelling as opposed to a commercial establishment. The fire, in *Clifford,* was extinguished at approximately 7:04 a.m. and a warrantless entry was made by investigators some five and a half (5½) hours later, at or about 1:30 p.m. on the same day. When the investigators had arrived, there was a crew working on the scene boarding up the Clifford home. The question raised on appeal was, whether or not this warrantless entry constituted a valid search, absent the existence of any corresponding consent by the owners? In determining this issue, the Court, in *Clifford,* held:

> "The constitutionality of warrantless and nonconsensual entries onto fire damaged premises, therefore, normally turns on several factors: whether there are legitimate privacy interests in the fire damaged property that are protected by the Fourth Amend-

ment; whether exigent circumstances justify the Government intrusion regardless of any reasonable expectations of privacy; and whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity."

In our case, the Pennsylvania Supreme Court concluded that there were no legitimate privacy interests in the Petitioner's Property in that the Petitioner did not take any measures to board up and secure his premises. It appears that the Court is concluding that the determination of whether or not there exists any right of privacy in a fire damaged dwelling would depend upon the owner taking immediate steps and measures to board up his structure. The Court, in *Clifford,* acknowledged that there could be "reasonable expectations of privacy" in fire damaged structures. Contrary to the Respondent's argument in our case, the *Clifford* Court determined that the existence of this "reasonable expectations of privacy" depends on a number of different factors. The Court, in *Clifford,* concluded that privacy expectations will vary depending upon the type of structure involved, the amount of damage sustained, the prior and continued use of the structure, the existence of personal belongings therein, and, in some cases, the owner's efforts to secure the structure.

After evaluating the above factors and determining that there exists among expectations of privacy associated with a home, as opposed to a commercial establishment, the Court, in *Clifford,* maintained that the warrantless search, some five and a half (5½) hours after the extinguishment of the fire, was improper and should have been subject to the "warrant requirement". As in *Clifford,* the case before this Court is similar in that the structure here

in question was a private dwelling. Furthermore, the Smith structure, although significantly damaged by the blaze, was still intact and still standing at the time of the entry. As in *Clifford,* the Petitioner lived in the structure with his wife and family up to the time of the fire. Correspondingly, all of the Petitioner's personal belongings, as well as the personal belongings of his wife and family, were in the building at the time of the blaze.

The major distinction between *Clifford* and the case before this Court is that there were no measures taken by the Petitioner, Mr. Smith, prior to the Fire Marshal's warrantless entry. The record will reflect that the entry in this case was made before any reasonable attempt could have been made to board up and secure the structure. The Fire Marshal testified that his warrantless entry was made at approximately 9:00 a.m. and that the Petitioner did not arrive on the premises until approximately 9:45 a.m., at or about the time the Fire Marshal was leaving the premises (R. 12a, 25a). The Petitioner, Mr. Smith, also testified that the Fire Marshal was already on the premises when he had arrived on the scene at approximately 10:00 a.m. (R. 33a).

A reading of the Pennsylvania Supreme Court's opinion in the case at bar gives one the impression that the existence of privacy is solely and exclusively predicated upon a homeowner's attempt to board up and secure his structure. We respectfully submit to this Honorable Court that not only is this interpretation impractical and difficult to implement, but in addition, it is contrary to the holding in *Michigan v. Clifford.* If the Pennsylvania Supreme Court's application of *Clifford* is correct, then an individual's ability to safeguard his right of privacy and Fourth Amendment

privileges would depend upon who arrived on the premises first. This would literally subject a person's ability to maintain a constitutional right to the winner of a racing event between owner-occupant and investigator. This, we respectfully submit, was not the intent of the *Clifford* Court, nor was it the Court's interpretation.

Lastly, the Respondent, in this case, has argued that *Clifford* also stands for the proposition that a fire marshal need only notify a homeowner of his intent to investigate the scene. If this interpretation of *Clifford* by the Respondent is correct, then we would have a significant and drastic deviation from existing search and seizure law as it exists today. What the Respondent is suggesting is that a fire marshal need not be concerned with the existence of probable cause if he has, in fact, notified the homeowner of his intent to investigate the scene. This, we respectfully submit, is not the holding in *Clifford,* nor is it the current status of search and seizure law in Pennsylvania. In the case before this Honorable Court, we acknowledge that the Fire Marshal did, in fact, have probable cause to secure a search warrant. On cross-examination and after being asked what the Fire Chief had related to him at the scene of the fire, the Fire Marshal responded in the following manner:

> "A. He asked just for an investigation. He said that the fire was of an unusual origin and at that time, he said that the power had been shut off and there would be no item in the house that would start the fire." (R. 20a)

In addition to the existence of probable cause, it was established that the Fire Marshal drove right by the Magis-

trate's Office on his way to the fire scene immediately prior to making his warrantless entry (R. 16a). We submit that these facts are significant in completely assessing and evaluating the issue which is before this Honorable Court.

Consequently, and by reason of the above, we respectfully submit that the case of *Michigan v. Tyler,* supra, as refined by *Clifford,* supports the Petitioner's contention that the warrantless entry made by the Fire Marshal, some twelve (12) hours after extinguishment of the fire, was improper. Accordingly, we respectfully submit that there did exist legitimate and significant expectations of privacy in the Petitioner's residence, so as to require the Fire Marshal to secure a warrant before searching the premises for any evidence of criminal activity.

This case ought to be reviewed by the Court particularly in light of your Petitioner's Constitutional rights being in issue and more importantly since legal minds sitting in judgment have had differences of opinion concerning the application of the law from the County Court level up to the highest Court in the State, to wit, the Supreme Court of Pennsylvania.

A brief review of the record to the extent that same has been appended to this petition clearly shows a history of suppression of evidence at the County Court level which was reversed upon appeal by a split decision at the Superior Court level and then affirmed by the Supreme Court which had filed three (3) opinions in the form of a majority opinion, concurring opinion, and dissenting opinion. The dissenting opinion in the Supreme Court had been circulated with the proposal that it become the majority opinion.

Reason for Granting Writ

Because of the serious issues involved in the warrantless search by a police officer and the differences of legal minds that have prevailed in all the Courts that this case has been argued before should certainly warrant a review of this case by the highest Court in our land. These differences without more ought to present to this Court a compelling purpose for review. Where reasonable legal minds would differ on a given Constitutional issue and where it has been clearly shown that differences have in fact arisen to resolve those issues, shouldn't the Court of Last Resort review these differences? The Supreme Court of Pennsylvania attempted to justify its opinion in asserting that exigent circumstances had existed when in fact the fire had been extinguished some twelve (12) hours prior to the State Policeman's warrantless entry onto the premises for the second time. Moreover, it attempted to imply that the State Police Officer had no time to obtain a search warrant when the record of the proceedings at the time of the Suppression Hearing from the mouth of the State Police Officer himself upon cross-examination testified that he drove past the Magistrate's (issuing authority) office in route to the Petitioner's house to seize the evidence. The thrust, however, of the Supreme Court's decision rested upon its acclaim that the State Police Officer's entry upon the premises some twelve (12) hours after the fire had been extinguished was nothing more than an actual continuation of the first entry.

The dissenting Pennsylvania Supreme Court Justice reasoned that the State Police Officer's second entry was to gather evidence of criminal activity and not to determine the cause and origin of the recent fire. The dissenting Justice bases his finding on what the State Police Officer said

at the Suppression Hearing that the fire was of a suspicious origin. Hence, what other reasons could he have had to have returned to the house but to gather evidence of what it was he suspected. The dissenting Justice reasoned that no exigent circumstances existed and that the Petitioner's Fourth Amendment rights were violated and that the evidence obtained should be suppressed as the lower Court had ruled. It is important to note that often, as the State Police Officer explained at the hearing in his testimony, that the term, "suspicious in origin" usually refers to an arson fire. It is important to note that it was the Trooper himself who testified that he suspected arson at the time of the fire some twelve (12) hours prior to his search and seizure.

In view of the several opinions that were written in the decision of the Pennsylvania Supreme Court and since the search was conducted without a valid warrant and without the consent of the Petitioner, and, moreover, without exigent circumstances necessary to support a warrantless search, the search was invalid under the Fourth and Fourteenth Amendments. Therefore, any evidence obtained as a result of this entry must therefore be excluded at the Petitioner's trial.

Any holding to the contrary would allow fire officials and police officers, whose jobs are not only to enforce the law but also to uphold it, to circumvent the warrant requirements by referring to every investigation of suspected criminal activity at the scene of a fire as an investigation of its cause and origin. The Supreme Court of the United States in *Tyler* and *Clifford* did not intend to further erode the warrant requirements of the Constitution in the manner that was accomplished by the majority Justices of the Penn-

sylvania Supreme Court who have reasoned as they had in this case.

A reading of the record clearly gives rise that the purpose for which the State Police Officer returned to the scene some twelve (12) hours after the fire had been extinguished was to gather evidence and not to determine the cause and origin of the fire. Therefore, this search and seizure necessitated a warrant or consent of the Petitioner or property owner prior to entry or that exigent circumstances existed as a matter of fact. Since the Police Officer had neither the consent of the Petitioner or in his possession a valid search warrant, then whatever it was that he had seized and had taken as evidence must be suppressed because exigent circumstances did not exist.

It was established that the electricity in the house had been turned off prior to the time of the fire. It is a further fact that twelve (12) hours had elapsed between the time the fire had been extinguished and the search and seizure had begun. It is also very clear that the likelihood of the fire rekindling was minimal. Wherefore, what exigency existed that would support the second entry without a warrant since the initial exigency that existed certainly would have been abated by the next morning, some twelve (12) hours later?

Another interesting reason propounded by your Petitioner is the justification the Supreme Court had given for the warrantless search was that it had considered the second entry as a continuation of the first despite the testimony of the State Police Officer who by his own admission said he had never entered the building at all the night of the fire. This would discount the continuation theory since there

was not an initial entry to begin with. Then what would have to have been classified as a second entry was in reality a first entry into the premises; thus, the nonconsenting search and ultimate seizure of the evidence was a violation of the Fourth and Fourteenth Amendments of the Petitioner.

In summary, the Petitioner requests a review of the warrantless search conducted by the State Police Officer and the seizure of evidence arising therefrom all being in violation of his Fourth and Fourteenth Amendment rights under the United States Constitution. To do this we must seek a review by this Petition of the judgment and opinion of the Pennsylvania Supreme Court.

CONCLUSION

For the reason herein assigned, it is respectfully submitted that the Petition for a Writ of Certiorari in the above-captioned matter should be granted.

Respectfully submitted,

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Judgment, Supreme Court

APPENDIX

SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 15 E.D. Appeal Docket 1985

COMMONWEALTH OF PENNSYLVANIA

v.

WALTER T. SMITH,

Appellant

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the JUDGMENT of the SUPERIOR COURT, be, and the same is hereby AFFIRMED.

BY THE COURT:
(s) Marlene F. Lachman
Marlene F. Lachman, Esq.
Prothonotary

Dated: 6/23/86

(J-163-1985)

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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15 E.D. Appeal Docket 1985

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

WALTER T. SMITH,
Appellant

Appeal from the Order entered August 10, 1984 and Amended August 15, 1984 of the Superior Court of Pennsylvania at No. 2954 Philadelphia, 1982 Reversing and Remanding the Order of the Court of Common Pleas of Susquehanna County entered October 14, 1982 at No. 1982-38

331 Pa. Superior Ct. 66, 479 A.2d 1081 (1984)

Argued—October 24, 1985

Majority Opinion, Supreme Court

OPINION OF THE COURT

MR. JUSTICE PAPADAKOS* FILED: JUNE 23, 1986

At about 8:00 p.m. on June 28, 1982, Appellant's residence was on fire when Raymond Cobb, a member of the Pennsylvania State Police, happened onto the scene. In addition to his highway duties, Officer Cobb was the Fire Marshall of Susquehanna County. As such, Officer Cobb was required to investigate any fire and determine its cause and origin. On the night in question, after the fire had been extinguished (somewhere between 9:00 p.m. and 9:30 p.m.) the local fire chief requested Officer Cobb's assistance in determining the cause of the fire. The electricity in the house in question had been turned off all day giving rise to the suspicion of arson. Neither Officer Cobb nor the chief undertook to pursue their investigation at that time because entry into the premises was blocked by residual heat and dripping water. Darkness had also fallen. They decided to glance into the residence through a doorway and then departed the scene. At 9:00 a.m. the next day, Officer Cobb returned to investigate the premises, photographs were taken and floor and carpet samples were extracted from the first floor of Appellant's residence. Officer Cobb conducted his investigation without first obtaining a warrant.

Appellant was thereafter arrested and charged with arson[1] and risking a catastrophe.[2] Appellant filed a timely

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* This case was reassigned to this writer on March 13, 1986.

[1] 18 Pa. C.S.A. §3301(b) 2-3.

[2] 18 Pa. C.S.A. §3302.

motion to suppress the evidence obtained by Officer Cobb on June 29, 1982. A hearing was held during which Appellant, his wife and Officer Cobb testified. In addition to the uncontroverted facts set forth above, at the suppression hearing, the Commonwealth attempted to establish that either Appellant or his wife gave Officer Cobb permission to search the residence. The suppression court found to the contrary, holding that the statement of Appellant's wife at the scene the night of the fire, "was too confused to find that she had granted permission to enter and search the building to anybody" (R. 25a). The court also found that on the day after the fire Officer Cobb had already entered Appellant's residence without permission before Appellant appeared on the scene and offered assistance to him. The suppression court concluded that Officer Cobb's search was constitutionally infirm and ordered the suppression of all the obtained evidence.

An appeal was filed by the Commonwealth to Superior Court[3] which, in a 2-1 decision, reversed the suppression court. (Cavanaugh and *Weiand,* JJ.; Cirillo, J. dissenting). In so doing, Judge Weiand, writing for the majority, held that exigent circumstances existed at the time of the fire, and that they continued to exist when Officer Cobb returned the next day, thus justifying a finding that a continuous entry existed against Appellant's property. Because of the late hour, and the remaining heat and water, Officer Cobb was held to have continued his warrantless investigation properly the next morning. Contrary to the Majority's determination, Judge Cirillo con-

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[3] This interlocutory appeal is permissible under *Commonwealth v. Dugger,* Pa. , 486 A.2d 382 (1985), and *Commonwealth v. Bosurgi,* 411 Pa. 56, 190 A.2d 304 (1963).

cluded that the primary object of Officer Cobb's warrantless search was to gather evidence of criminal activity, not to determine the cause and origin of the recent fire. Therefore, the dissent is of the view that the "exigent circumstance" exception was not applicable.

The Fourth and Fourteenth Amendments[4] to the United States Constitution protect citizens from "unreasonable searches and seizures." Those amendments also require an independent determination of probable cause and reasonableness prior to the issuance of a search warrant. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The United States Supreme Court has, however, carved out exceptions to the requirement of a search based upon a warrant. For example, an individual's consent will obviate the necessity of obtaining a search warrant. *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Likewise, "exceptional" circumstances may exist which will require immediate action rather than seeking a prior judicial determination of probable cause. In those "exceptional" circumstances, a law enforcement agent seeking to conduct a warrantless search may do so if incident to a lawful arrest or to prevent destruction or removal of contraband. *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). If so, a warrantless search is valid so long as that search is reasonable.

Particularly relevant to this appeal, the United States Supreme Court has held that a fire official may, without a warrant enter a burning building to fight a fire. A burning building present a clear exigency that renders a war-

[4] No State Constitutional issues are raised in this appeal.

rantless entry reasonable and, once in the building, firefighters may seize evidence of arson that is in plain view and they may investigate the cause of the fire. *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). Under what circumstances, then, may a fire marshall not conduct an investigation without a search warrant, where consent has not been properly obtained? To answer this question, it is necessary to review in detail the two most recent United States Supreme Court cases on the subject.

In *Tyler,* the United States Supreme Court attempted to resolve the issue of when a fire marshall may conduct a nonconsenting, warrantless search. While fighting a fire at the defendant's furniture store, fire officials found two plastic containers of flammable liquid. Immediately, the fire chief examined the containers and summoned a police detective to assist in his investigation to determine the origin and cause of the fire. This investigation had to be abandoned due to the smoke and steam present in the building. By 4:00 a.m., the fire had been extinguished and the firefighters had departed. At 8:00 a.m., the same fire officials, along with the assistant fire chief who had not been there previously,[5] again appeared on the scene to determine the origin and cause of the fire. After a cursory examination, the officials left and returned for a third time an hour later. During this last visit, the fire officials obtained various floor and carpeting samples. Approximately three weeks later, another police official visited the furniture store, took photographs, and conducted a more thorough

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[5] See, *Michigan v. Clifford,* U.S. , 104 S.Ct. 641, L. Ed. 2d (1984), Justice Steven's concurring opinion, footnote 2. This case is discussed below.

search of the premises. At no time did any police or fire official obtain a search warrant or have the owner's consent.

In upholding the warrantless search conducted the next morning, the Supreme Court found as a significant factor the difficulty the fire officials encountered in continuing the initial investigation undertaken while fighting the fire to determine its cause and origin. The majority further held that since a burning building presents an exigent circumstance sufficient to justify a fireman's entry into the building for the purpose of terminating the fire, any search incident thereto cannot be unreasonable. Because firefighters not only have a duty to extinguish the fire, but also have a duty to determine the cause of the fire, as a protection against reoccurrence, no search warrant or consent is necessary if any such investigation occurs promptly. The Court said:

> . . . [O]fficials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional. (Footnote omitted.)

436 U.S. 510, 98 S.Ct. 1950. In *Tyler,* the firemen did not remain at the scene to complete their investigation on the night of the fire because of physical impediments, but returned the next morning. Since the Court found no fault in leaving the damaged building, the Court determined that the warrantless search the next morning was merely a continuation of the properly initiated investigation.

> Under the circumstances, we find that the morning entries were no more than actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence.

436 U.S. 511, 98 S.Ct. 1951. The Court, however, did invalidate subsequent warrantless searches as being detached from the "initial exigency and warrantless entry." *Id.*

Six years later, the United States Supreme Court attempted "to clarify doubt that appears to exist as to the application of our decision in *Tyler,*" in *Michigan v. Clifford,* U.S. , 104 S.Ct. 641, L.Ed.2d (1984).

In *Clifford,* the defendants were arrested and charged with arson in connection with a fire at their residence, occurring on October 18, 1980, while they were on vacation. By 7:00 a.m., the fire had been extinguished. Having been informed that arson was suspected, the fire investigator commenced his investigation of the fire at 1:00 p.m. without either a search warrant or the defendants' consent. Since a work crew was securing the house, the fire investigator had to wait until 1:30 p.m. to gain entry. While awaiting entry, the investigator found a fuel can in the driveway. Upon entry into the house, the investigator determined that the fire originated in the basement beneath the stairway. Further investigation uncovered other fuel cans and a crock pot with wires leading to an electrical timer. Thereafter, the investigating team conducted a thorough examination of the remainder of the house, parts of which had not suffered serious damage, gathering other evidence to support its suspicion of arson. The Cliffords

moved to suppress all evidence seized as invalid under the Fourth and Fourteenth Amendments.

A majority of the United States Supreme Court upheld the suppression of the evidence although no clear majority opinion was filed. Justice Powell writing for the four member plurality stated that:

> The constitutionality of warrantless and nonconsensual entries onto fire-damaged premises, therefore, normally turns on several factors: whether there are legitimate privacy interests in the fire-damaged property that are protected by the Fourth Amendment, whether exigent circumstances justify the government intrusion regardless of any reasonable expectation of privacy; and, whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity.

U.S. , 104 S.Ct. 646. Reaffirming *Tyler,* Justice Powell stated that a burning building creates an exigent circumstance which justifies not only a warrantless entry by fire officials to fight the blaze, but also requires no warrant for fire officials to *remain* in the building for a reasonable time thereafter to investigate the *cause* of the blaze. Justice Powell points out, however, that firemen fighting a fire frequently do not *remain* within a building once they enter. He points out that in many situations, entry may be too hazardous until the fire has been wholly extinguished and that even then the danger of collapsing walls may exist. Thus, the effort to ascertain the cause of a fire may extend over a period of time with entry and re-entry. He views the critical inquiry, therefore, as being whether reasonable expectations of privacy exist in the fire-dam-

aged premises at a particular time and, if so, whether exigencies justify the re-entries.[6] The aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant or to secure the owner's consent. For example, an immediate threat that the blaze might rekindle presents an exigency that would justify a warrantless and nonconsensual post-fire investigation. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction.[7] Because determining the cause and origin of a fire serves a compelling public interest, the warrant requirement does not apply in such circumstances.

However, if the nonconsensual search, compelled by exigent circumstances, is not for the purpose of determining the cause and origin of the fire, an appropriate search warrant is required. Justice Powell stated:

> The object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined.

U.S. , 104 S.Ct. 649.

Reading *Tyler* and *Clifford* together, certain principles regarding the Fourth Amendment and investigations of the causes and origins of fire are clear. Firemen have the right to enter a private residence without a warrant without violating the Fourth and Fourteenth Amendments of the United States Constitution, if done so for the purpose of extinguishing a fire. While performing the task, firemen

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[6] See, *Clifford, supra,* footnote 3 of Justice Powell's opinion.
[7] See *Clifford, supra,* footnote 4 of Justice Powell's opinion.

may seize any evidence, which is in plain view, of the cause and origin of the fire. In fighting the fire, fire officials are also immediately charged with determining the cause and origin of the fire. The purposes of the investigation into the cause and origin of the fire may properly include prevention of the rekindling of the fire, and prevention of the destruction of evidence, either accidentally or intentionally. When the search is conducted for one of these purposes, no search warrant is necessary, even if consent has not been granted, but only if the search is a continuation of an initial entry. If the nonconsenting, warrantless entry is begun, but must be terminated due to the condition of the building, then that search may be continued at the first instance reentry is possible. Finally, if it is clearly shown that the search is not for the purpose of determining the cause and origin of the fire, but rather to obtain evidence of criminal activity, then such search must either be with consent or with a valid search warrant.

Applying these principles to the present case, it is apparent that the evidence should not be suppressed. From the testimony of Officer Cobb, one can only conclude that the purpose of the search the morning after the fire was to determine its cause and origin. Officer Cobb did not enter the building to investigate the cause of the fire on the evening it occurred because he looked into the building and "saw that the place was extremely hot yet and a large amount of water was coming down through the ceiling and also it was late in the evening." N.T. at 3. *There is nothing on the record before us,* nor even a suggestion by Appellant in his brief, that Officer Cobb, or anyone else, knew at this time what the cause or origin of the fire was. Indeed, the *only thing* that fire officials knew or had rea-

son to believe on the evening of the fire and the next morning was that electricity was *not* the cause of the fire and that, since no other cause was *apparent,* the fire was "suspicious in nature." N.T. at 11-13.

We do not ascribe critical importance to Officer Cobb's "suspicions of arson." A mere suspicion without more—which is *all* that there was in this case on the morning after the fire at 9:00 a.m.—does not convert an investigation of the cause of a fire into a search to gather evidence of criminal activity known to have taken place. On the basis of what Officer Cobb knew on the morning in question, it is clear that he had only a suspicion, and mere suspicions do not constitute probable cause to support a search warrant. Since an exigent circumstance existed, that is the need to discover the origin of the fire, a warrantless entry or re-entry was permitted.

The final question that remains, therefore, is whether the re-entry here on the morning after the fire was put out, was a continuation of an original entry. We conclude that like *Tyler,* and unlike *Clifford,* the re-entry here *was* a continuation of an original entry, and that it occurred at the first reasonable opportunity to do so. Essentially, Officer Cobb's entry or re-entry was a continuation of the entry by the firefighters the evening before. Even if it could reasonably be contended that Officer Cobb was a different investigator, separate and distinct from the firemen, and that his entry the next morning was somehow not continuous with that of the firemen the night before (a contention which we reject), Appellant's argument must nevertheless fail. While the United States Supreme Court did state in *Tyler* that "the morning entries were no more than an actual continuation of the first, and the lack

of a warrant thus did not invalidate the resulting seizure of evidence," 436 U.S. at 511, the constitutional importance of this finding lies not simply in the fact that an investigation once begun may continue at a later time, but in the fact that there is an exigent need to determine the cause of a fire and that if conditions prevent fire investitors from making an immediate cause determination, the investigation may be made or continue at the first reasonable opportunity to do so after dousing the flames. A fire creates an exigent need to put it out, of course, and it also creates a vital need to ascertain the cause.

Where conditions such as "darkness, steam and smoke" prevent the investigators from completing their investigation, the exigency—the need to find the cause—remains. This exigency is exactly the same whether the fire officials first start to investigate by actually entering the building and then break-off the investigation due to adverse conditions, or whether, as in the instant case, the conditions (intense heat, water and darkness) prevented specific investigators from themselves entering in the first place. In either event, the cause of the fire remains undetermined until an investigator discovers its origin. We reject the argument based on *Tyler* to the effect that Officer Cobb's search would have been a "good search" had he but first entered the building the previous night before deciding it was too hot, wet and dark to conduct an investigation, and then left, but because he simply stood outside the building and, based on personal observation, years of experience as a fire marshall, and common sense, decided that it would be wise to return the first thing in the morning to start the investigation, that it was a "bad search." It is obvious that such a "distinction" between this case

and *Tyler* is one without difference and one which has little or no relevance to the validity of the fire investigation.

We do not hold that a fire authorizes a search for all times thereafter. But an investigation the first thing on the morning after, utilizing daylight, is a reasonable and necessary exercise of prudence both to be certain the fire is out and the cause determined. "Exigency" is a reasonable standard when reasonably determined, and circumstances are the determining factor. "Reasonable expectations of privacy" cannot be expected to defeat wind, flood, ice and fire. When flames leap from a building from the most innocent or most malicious cause, all expectations of privacy are lost in an immediate public concern for life and property. That concern does not end until the fire is out *and* its cause has been determined within prompt, reasonable, rational, life-preserving periods of time, under the different and extraordinary exigencies caused by fire. It would be a mistake to declare that the morning after is too late. Arsonists might then take note and carefully control their fires to burn before the morning light. The use of a carefully planted timer was suggested in *Clifford, supra.*

Likewise, to hold that the evidence obtained by Officer Cobb should be suppressed because he was suspicious when he went to the fire ground the morning after and that he should, therefore, have had a warrant, is unreasonable under the circumstances, creating unrealistic time sanctuary for clever arsonists, who the morning after, can whistle while they hide what the dark concealed a few hours before.

For the reasons set forth above, the judgment of the Superior Court is affirmed.

MESSRS. JUSTICE LARSEN, MCDERMOTT and HUTCHINSON join in this Opinion.

MR. JUSTICE LARSEN filed a Concurring Opinion in which MR. JUSTICE HUTCHINSON joined.

MR. JUSTICE ZAPPALA filed a Dissenting Opinion in which MR. CHIEF JUSTICE NIX and MR. JUSTICE FLAHERTY joined.

[J-163-1985]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 15 E.D. Appeal Dkt. 1985

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

WALTER T. SMITH,
Appellant

Appeal from the Order entered August 10, 1984 and Amended August 15, 1984 of the Superior Court of Pennsylvania to No. 2954 Philadelphia, 1982 Reversing and Remanding the Order of the Court of Common Pleas of Susquehanna County entered October 14, 1982 at No. 1982-38

331 Pa. Super. 66, 479 A.2d 1081 (1984)

Argued: October 24, 1985

CONCURRING OPINION

JUSTICE ROLF LARSEN FILED JUNE 23, 1986

I join the majority opinion. The warrantless, non-consensual search and seizure of evidence by Officer/Fire Marshall Cobb on the morning after the fire had been ex-

tinguished is *constitutionally and logically indistinguishable* from the morning-after search and seizure of evidence by fire investigators that received the approval of the United States Supreme Court in *Michigan v. Tyler,* 436 U.S. 499 (1978). I write separately to address the dissent's erroneous proclamation that "the majority has etched a new justification for a warrantless search." Slip op. at 1.

There is nothing at all "new" about the justifications, *i.e.,* the exigent circumstances justifying a warrantless search and seizure, that were recognized by the United States Supreme Court in *Michigan v. Tyler,* 436 U.S. 499 (1978), and reaffirmed by that Court in *Michigan v. Clifford,* U.S. , 104 S.Ct. 641 (1984). The dissent seems to believe that *Tyler* recognized only a single exigent circumstance, namely the fighting of a fire and prevention of "the possibility of rekindling" by determining "the cause of the fire as a protection against reoccurrence. . . ." Slip op. at 1, 2 and 4.

This exceedingly narrow view of *Tyler*—that the exigent need to determine the cause and origin of the fire is over the instant the fire is out and there is no possibility of its rekindling[1]—ignores *Tyler's* reasoning and explicit lan-

[1] The dissent is convinced that, at 9:00 a.m. on the morning after the fire at appellant's home, there was no possibility of its "reoccurrence" or "rekindling" because the electricity had been shut-off and because of the "twelve hour time lapse between the extinguishing of the fire and the search. . . ." Slip op. at 10. A fire official would, it seems to me, be remiss in his duties if he were to reach such a conclusion based solely on the fact that twelve hours had elapsed and electricity had been shut-off I, for one, would be most reluctant to rehabitate my residence knowing only what fire officials in the instant case knew at 9:00 a.m. on the morning after.

guage to the contrary. In *Tyler,* the United States Supreme Court, in reversing the Michigan Supreme Court, stated:

> [The opinion of the] Michigan Supreme Court . . . may be read as holding that the exigency justifying a warrantless entry to fight a fire ends, and the need to get a warrant begins, with the dousing of the last flame. 399 Mich., at 579 250 NW2d at 475. *We think this view of the firefighting function is unrealistically narrow, however. Fire officials are charged not only with extinguishing fires, but with finding their causes.* Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. *Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction.* And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victim. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises *for these purposes* also is constitutional.

Id. at 509-510 (emphasis added).

There was no real dispute with these principles. The major issue in *Tyler* was with their application to the morning-after searches and seizures conducted to determine the origins of the fire and to obtain evidence of the

suspected arson. The defendants argued that the Michigan Supreme Court was correct in viewing any "exigency" as over at 4:00 a.m. when firefighters and investigators left the scene and that their "departure and re-entry four hours later that morning required a warrant." Justice Stewart, expressing the views of the five members of the Court, stated:

> On the facts of this case, we do not believe that a warrant was necessary for the early morning re-entries on January 22. As the fire was being extinguished, Chief See and his assistants began their investigation, but visibility was severely hindered by darkness, steam, and smoke. Thus they departed at 4 a.m. and returned shortly after daylight to continue their investigation. Little purpose would have been served by their remaining in the building, except to remove any doubt about the legality of the warrantless search and seizure later that same morning. *Under these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence.*

Id. at 511. (Emphasis added.)[2]

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[2] The Court affirmed the Michigan Supreme Court's grant of a new trial, however, because of the subsequent searches and seizures. The Court held:

> The entries occurring after January 22, however, were clearly detached from the initial exigency and warrantless entry. Since all of these searches were conducted without valid warrants and without consent, they were invalid under the Fourth and Fourteenth Amendments, and any evidence obtained as a result of those entries must, therefore, be excluded at the respondents' retrial.

Tyler clearly controls the instant case and validates the morning-after search and seizure of evidence by Officer Cobb under the circumstances. The exigent circumstances recognized in *Tyler* as justification for a warrantless search and seizure were the need to extinguish the fire and the need to determine its cause and origin not only to prevent rekindling but also "to preserve evidence from intentional or accidental destruction," and these exigencies continued to exist even where the investigation was broken off due to adverse conditions and resumed a reasonable time thereafter. Those same exigent circumstances were present in equal force in the instant case.

Mr. Justice Hutchinson joins in this concurring opinion.

[J-163-1985]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 15 E.D. Appeal Docket 1985

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

WALTER T. SMITH,
Appellant

Appeal from the Order entered August 10, 1984 and Amended August 15, 1984 of the Superior Court of Pennsylvania at No. 2954 Philadelphia, 1982 Reversing and Remanding the Order of the Court of Common Pleas of Susquehanna County entered October 14, 1982 at No. 1982-38

331 Pa. Super. 66, 479 A.2d 1081 (1984)

Argued: October 24, 1985

DISSENTING OPINION

JUSTICE ZAPPALA FILED: JUNE 23, 1986

I dissent.

Today the majority has etched a new justification for a warrantless search. Now when a fire investigator cannot obtain a search warrant for lack of probable cause, we will permit him to search under the guise of discovering the *cause* and *origin* of the fire. This is so even if the exigency which previously supported this intrusion (i.e. possibility of rekindling) no longer exists.*

The Fourth and Fourteenth Amendments[1] to the United States Constitution protect citizens from "unreasonable searches and seizures." The amendments also require an independent determination of probable cause and reasonableness prior to the issuance of a search warrant. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The United States Supreme Court has, however, carved out exceptions to the requirements of a search based upon a warrant. For example, an individual's consent will obviate the necessity of obtaining a search warrant. *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Likewise, "exceptional" circumstances may exist which will require immediate action rather than seeking a prior judicial determination of probable cause. In those "exceptional" circumstances, a law enforcement agent seeking to conduct a warrantless search may do so if incident to a lawful arrest or to prevent destruction or removal of contraband. *Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436

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* The following opinion was originally circulated as a proposed majority opinion and is now being resubmitted as my dissent. It appears that the majority has adopted verbatim the legal analysis and rationale of this dissent. (See majority opinion pp. 3-11).

[1] No State constitutional issues are raised in this appeal.

(1948). If so, a warrantless search is valid so long as that search is reasonable.

Particularly relevant to this appeal, the United States Supreme Court has held that a fire official may enter a burning building under an emergency doctrine to fight the fire. *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978). Under what circumstances, then, may a fire marshall conduct an investigation without a valid search warrant, where consent has not been properly obtained. To determine this issue, it is important to review in detail the two most recent United States Supreme Court cases regarding this issue.

In *Tyler,* the United States Supreme Court attempted to resolve the issue of when a fire marshall may conduct a nonconsenting, warrantless search. While fighting the fire at the defendant's furniture store, fire officials found two plastic containers of flammable liquid. Immediately, the fire chief examined the containers and summoned a police detective to assist in his investigation to determine the origin and cause of the fire. This investigation had to be abandoned due to the smoke and steam present in the building. By 4 a.m., the fire had been extinguished and the fire fighters had departed. Four hours later, the same fire officials again appeared on the scene to determine the origin and cause of the fire. After a cursory examination, the officials left and returned for a third time an hour later. During this last visit, the fire officials obtained various floor and carpeting samples. Approximately three weeks later, another police official visited the furniture store, took photographs, and conducted a more thorough search of the premises. At no time did any police or fire official obtain a search warrant or have proper consent.

In upholding the warrantless search conducted the next morning, the Supreme Court found as a significant factor, the difficulty the fire officials encountered in continuing the initial investigation undertaken while fighting the fire to determine its cause and origin. The majority further held that since a burning building presents an exigent circumstance sufficient to justify a fireman's entry into the building for the purpose of terminating the fire, any search incident thereto cannot be unreasonable. Because firefighters not only have a duty to extinguish the fire, but also have a duty to determine the cause of the fire, as a protection against reoccurrence, no search warrant or consent is necessary if any such investigation occurs promptly. The Court said:

> . . . [O]fficials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional. (Footnote omitted.)

436 U.S. 510, 98 S.Ct. 1950. In *Tyler,* the firemen did not remain at the scene to complete their investigation on the night of the fire because of physical impediments, but returned the next morning. Since the Court found no fault in leaving the damaged building, the Court determined that the warrantless search the next morning was merely a continuation of the properly initiated investigation.

> Under the circumstances, we find that the morning entries were no more than actual continuation

> of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence.

436 U.S. 511, 98 S.Ct. 1951. The Court, however, did invalidate subsequent warrantless searches as being detached from the "initial exigency and warrantless entry." *Id.*

Six years later, the United States Supreme Court attempted "to clarify doubt that appears to exist as to the application of our decision in *Tyler,*" in *Michigan v. Clifford,* U.S. , 104 S.Ct. 641, L.Ed.2d (1984).

In *Clifford,* the defendants were arrested and charged in connection with a fire at their residence, occurring on October 18, while they were on vacation. By 7 a.m., the fire had been extinguished. Having been informed that arson was suspected, the fire investigator commenced his investigation of the fire at 1 p.m. without either a search warrant or the Appellant's consent. Since a work crew was securing the house, the fire investigator had to wait until 1:30 p.m. to gain entry. While awaiting entry, the investigator found a fuel can in the driveway. Upon entry into the house the investigator determined that the fire originated in the basement beneath the stairway. Further investigation uncovered other fuel cans and a crock pot with wires leading to an electrical timer. Thereafter, the investigating team conducted a thorough examination of the remainder of the house, gathering other evidence to support its suspicion of arson. The Cliffords moved to suppress all evidence seized as invalid under the Fourth and Fourteenth Amendments.

A majority of the United States Supreme Court upheld the suppression of the evidence although no clear majority

opinion was filed. Justice Powell writing for four members of the majority stated that:

> The constitutionality of warrantless and nonconsensual entries onto fire-damaged premises, therefore, normally turns on several factors: whether there are legitimate privacy interests in the fire-damaged property that are protected by the Fourth Amendment; whether exigent circumstances justify the government intrusion regardless of any reasonable expectation of privacy; and, whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity.

U.S. , 104 S.Ct. 646. Reaffirming *Tyler,* Justice Powell stated that a burning building creates an exigent circumstance which justifies not only a warrantless entry by fire officials to fight the blaze but permits fire officials to remain in the building for a reasonable time thereafter to investigate the *cause* of the blaze. As in *Tyler,* Justice Powell opined that the aftermath of a fire often presents exigent circumstances which require immediate investigation to protect the public interests. In that situation no warrant is necessary. However, if the nonconsenting search is not compelled by exigent circumstances or if the object of that search is not to determine the cause and origin of the fire, the appropriate search warrant is required. Justice Powell stated:

> Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined. If, for example, the administrative search is justified by the immediate need to

> ensure against rekindling, the scope of the search may be no broader than reasonably necessary to achieve its end. A search to gather evidence of criminal activity not in plain view must be made pursuant to a criminal warrant upon a traditional showing of probable cause.
>
> U.S. , 104 S.Ct. 647.

In distinguishing *Clifford* from *Tyler*, Justice Powell placed great weight on the fact that *no search* had been commenced in *Clifford* at the time the fire had been extinguished, while in *Tyler*, the fire officials started their investigation only to be thwarted by uncontrollable elements. Thus, *Tyler's* warrantless search was permissible as a reasonable continuation of a proper warrantless search while in *Clifford* the warrantless search could not be upheld as a continuation since no search had begun at the time the fire was extinguished.

In his opinion concurring in the judgment of the court, Justice Stevens raises another relevant factor in distinguishing *Clifford* from *Tyler*. In *Tyler*, the fire officials conducting the search the day after the fire was extinguished were the same fire officials that attempted to search the building the night of the fire. This was not the case in *Clifford*. Therefore, there could be no continuation of the previously conducted search. Furthermore, Justice Stevens would hold that once the firemen have left the scene of the fire, the exigent circumstances justifying a warrantless search to prevent re-occurrence would cease, thereby requiring adherence to the Fourth and Fourteenth Amendments. However, unlike Justice Powell, Justice Stevens would hold that any entry into a building subse-

quent to extinguishing a fire would require a criminal search warrant unless the owner had received sufficient notice of the proposed search.

> . . . I believe the two clauses of the Fourth Amendment command-would require the fire investigator to obtain a traditional criminal search warrant in order to make an unannounced entry, but would characterize a warrantless entry as reasonable whenever the inspector had given either the owner sufficient advanced notice to enable him or an agent to be present, or had made a reasonable effort to do so. (Footnote omitted.)

U.S. , 104 S.Ct. 652. Since the Cliffords had not received actual advance notice of the search, nor had the fire officials even attempted to so notify them, Justice Stevens would find the warrantless search unreasonable and violative of the Fourth Amendment.

Finally, the four dissenting Justices would have held that the Cliffords had no expectation of privacy because they were away, and that the intrusion by the fire inspector was neither "new or substantially different intrusion from that which occurred when the fire fighters first arrived to extinguish the flames" and that the subsequent search was merely a continuation of the original entry. U.S. , 104 S.Ct. 655. Thus, the search was reasonable and not violative of the Fourth Amendment.

Reading *Tyler* and *Clifford* together, certain principles regarding the Fourth Amendment and investigations of the causes and origins of fires are clear. Firemen have the right to enter a private residence without a warrant without violating the Fourth and Fourteenth Amendments of

the United States Constitution if done so for the purpose of extinguishing a fire. While performing the task, firemen may seize any evidence, which is in plain view, of the cause and origin of the fire. In addition to fighting the fire, fire officials are charged with determining the cause and origin of the fire. The purpose of the investigation into the cause and origin of the fire is to prevent rekindling of the fire. When the search is conducted for this purpose, then no search warrant is necessary even if consent has not been granted, but only if the search is a continuation of the initial entry. If the nonconsenting, warrantless search into the cause and origin of the fire is begun, but must be terminated due to the condition of the building, then that search may be continued at the first instance reentry is permissible. Finally, if it is clearly shown that the search is not for the purpose of determining the cause and origin of the fire, but rather to obtain evidence of criminal activity, then such search must either be with consent or with a valid search warrant.

Applying these principles to the present case, it is apparent that the evidence must be suppressed. From the testimony of Officer Cobb, one can only conclude that the purpose of the search the morning after the fire was to obtain evidence of arson. The fact that the electricity in the house had been turned off the day of the fire supported Officer Cobb's suspicion of arson. Because of the twelve hour time lapse between the extinguishing of the fire and the search, it is abundantly clear that the likelihood of the fire rekindling was minimal. Therefore, the exigency which supported the initial entry abated by the next morning when Officer Cobb conducted his search. Likewise, since Officer Cobb, by his own admission, never entered

the building the night of the fire, justification for the search the next day cannot be found in the "continuation" theory set forth in *Tyler*. Thus, the nonconsenting search and ultimate seizure of evidence was violative of the Fourth and Fourteenth Amendments and cannot be sustained.[2]

For the foregoing reasons, I would reverse the order of the Superior Court and reinstate the order of the Court of Common Pleas of Susquehanna County.

MR. CHIEF JUSTICE NIX and MR. JUSTICE FLAHERTY join in this Dissenting Opinion.

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[2] The trial court specifically found that the Appellant's wife did not consent to the search and the Commonwealth presents no evidence or argument to refute this finding. My independent review of the record supports this determination by the Suppression Court.

J. 19063/84

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2954 Philadelphia, 1982

COMMONWEALTH OF PENNSYLVANIA,

Appellant

vs.

WALTER T SMITH,

Appellee

AMENDED JUDGMENT

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Susquehanna County be, and the same is hereby Reversed and Remanded for Trial. Jurisdiction is not Retained.

By the Court:

(s) J. Haniel Henry

J. Haniel Henry

Prothonotary

Dated: August 15, 1984

J. 19063/84

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Appellant

vs.

WALTER T. SMITH,

Appellee

Appeal from Suppression Order of the Court of Common Pleas, Criminal Division, of Susquehanna County, No. 1982-38.

BEFORE: CAVANAUGH, WIEAND AND CIRILLO, JJ.

OPINION BY WIEAND, J.: FILED: AUG. 10, 1984

Where darkness, residual heat and dripping water make it difficult, if not impossible, to investigate the cause of a residential fire on the same night that the fire has been extinguished, may a fire marshall return the following morning and continue his investigation without a search warrant? The trial court held that he could not re-enter the fire-damaged building without a warrant and, therefore, suppressed evidence obtained by the fire marshall which tended to show that the fire had been of incendiary origin. The Commonwealth appealed. We reverse.

On the evening of June 28, 1982, a residence owned by Walter T. Smith and Cherry Lee Smith, husband and wife, in Great Bend, Susquehanna County, was found

afire. Raymond Cobb, a member of the Pennsylvania State Police who also served as fire marshall in Susquehanna County, arrived at the fire while the home was still ablaze. He was told by the local fire chief that the origin of the fire seemed suspicious and was requested to determine the cause of the fire. After the fire had been extinguished at or about 9:30 p.m., Cobb found that he was unable to enter the premises and conduct an investigation because of residual heat and dripping water. Cobb told Mrs. Smith that he would come back to make his investigation at a later time. He returned the following morning at or about 9:00 a.m., when he entered to investigate and determine the cause of the fire. He did not then have a search warrant; he also did not have the owner's consent to enter the fire-damaged building. Nevertheless, he removed floor samples and took photographs of the interior and exterior of the building. The owner of the building, Walter T. Smith, was subsequently arrested and charged with arson. He moved to suppress evidence on grounds that Cobb had obtained the same as a result of an unlawful search. The trial court agreed, and suppressed all evidence thus obtained except photographs of the exterior of the building.

Initially, we observe that the Commonwealth has a clear right of appeal from the suppression order. The record supports its contention that the suppression of the evidence obtained by Cobb will substantially handicap it in its prosecution of Smith for arson. See: *Commonwealth v. Markman,* Pa. Super. n.1, 467 A.2d 336, 338 n.1 (1983), citing *Commonwealth v. Lapia,* Pa. Super. , , 457 A.2d 877, 884 (1983).

"The primary aim of the Fourth Amendment is to protect people from unreasonable intrusions of legiti-

mate expectations of privacy." *Commonwealth v. Tann,* 500 Pa. 593, 598-599, 459 A.2d 322, 325 (1983). Accord: *Commonwealth v. Flewellen,* 475 Pa. 442, 446, 380 A.2d 1217, 1219 (1977); *Commonwealth v. Vernille,* 275 Pa. Super. 263, 272, 418 A.2d 713, 718 (1980). See: *Steagald v. United States,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *Rawlings v. Kentucky,* 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). As a general rule, with but few exceptions, warrantless searches are unreasonable. See: *Payton v. New York,* 445 U.S. 573, 586-587, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639, 651 (1980); *Commonwealth v. Silo,* 480 Pa. 15, 20, 389 A.2d 62, 65 (1978), *cert. denied,* 439 U.S. 1132, 99 S.Ct. 1053, 59 L.Ed.2d 94 (1979); *Commonwealth v. Hartford,* Pa. Super. , , 459 A.2d 815, 817 (1983); *Commonwealth v. Vernille supra* at 272, 418 A.2d at 718. See also: *Commonwealth v. Westerfer,* 294 Pa. Super. 459, 462, 440 A.2d 556, 558 (1982). If reasonable privacy expectations remain in fire-damaged property, "the warrant requirement applies, and any official entry must be made pursuant to a warrant in the absence of consent or exigent circumstances." *Michigan v. Clifford,* U.S. , , 104 S.Ct. 641, 646, 78 L.Ed. 2d 477, 483 (1984).[1] Where the owner of the building consents to an official entry to investigate the cause of the fire, there is no longer any need for a search warrant, for reasonable expectations of privacy, if any, have been

[1] The opinion announcing the judgment of the Court was written by Justice Powell. He was joined by Justices Brennan, White and Marshall. Justice Stevens wrote a concurring opinion. The dissenting opinion written by Justice Rehnquist was joined by Chief Justice Burger and by Justices Blackmun and O'Connor.

waived. *Commonwealth v. Markman, supra.* "A burning building of course creates an exigency that justifies a warrantless entry by fire officials to fight the blaze." *Michigan v. Clifford, supra* at , 104 S.Ct. at 646, 78 L.Ed.2d at 483. Once in the building, officials need no warrant to remain for a "reasonable time to investigate the cause of a blaze after it has been extinguished." *Michigan v. Tyler,* 436 U.S. 499, 510, 98 S.Ct. 1942, 1950, 56 L.Ed.2d 486, 499 (1978). (Footnote omitted.)[2]

"The constitutionality of warrantless and nonconsensual entries onto fire-damaged premises . . . normally turns on several factors: whether there are legitimate privacy interests in the fire damaged property that are protected by the Fourth Amendment; whether exigent circumstances justify the government intrusion regardless of any reasonable expectations of privacy; and, whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity." *Michigan v. Clifford, supra* at , 104 S.Ct. at 646, 78 L.Ed.2d at 483. The validity of warrantless, nonconsensual entries by law enforcement officials—including fire personnel—has uniformly been upheld "when there is compelling need for official action and no time to secure a warrant." *Michigan v. Tyler, supra* at 509, 98 S.Ct. at 1949, 56 L.Ed.2d at 498 (citing cases). See: *United States v. Velasquez,* 626 F.2d 314 (3rd Cir. 1980); *United States v. Moskow,* 588 F.2d 882 (3rd Cir. 1978); *Commonwealth v. Holzer,* 480 Pa.

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[2] In Pennsylvania, state police fire officials are charged by statute with responsibility for "investigat[ing] the origin or circumstances of any fire occurring in this Commonwealth." Act of April 27, 1927, P.L. 450, No. 291, §§2, 4, as amended, 35 P.S. §§1182, 1184. See: *Commonwealth v. Simkins,* 297 Pa. Super. 258, 265, 443 A.2d 825, 828-829 (1982).

93, 389 A.2d 101 (1978); *Commonwealth v. Hinkson,* Pa. Super. , 461 A.2d 616 (1983); *Commonwealth v. Henkel,* 306 Pa. Super. 346, 452 A.2d 759 (1982).

In *Michigan v. Tyler, supra,* the defendants argued that the exigency created by the blaze had terminated upon the suppression of the fire. Under this theory, a warrant would have been necessary for *all* searches occurring after containment of the fire. The Supreme Court of the United States disagreed. It found that the defendants' view of the fire-fighting function was "unrealistically narrow." The Court said:

> Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent recurrence as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional.
>
> The respondents argue, however, that the Michigan Supreme Court was correct in holding that the departure by the fire officials from Tyler's Auction

at 4 a.m. ended any license they might have had to conduct a warrantless search. Hence, they say that even if the firemen might have been entitled to remain in the building without a warrant to investigate the cause of the fire, their departure and re-entry four hours later that morning required a warrant.

On the facts of this case, we do not believe that a warrant was necessary for the early morning re-entries on January 22. As the fire was being extinguished, Chief See and his assistants began their investigation, but visibility was severely hindered by darkness, steam, and smoke. Thus they departed at 4 a.m. and returned shortly after daylight to continue their investigation. Little purpose would have been served by their remaining in the building except to remove any doubt about the legality of the warrantless search and seizure later that same morning. *Under these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence.*

Id. at 510-511, 98 S.Ct. at 1950-1951, 56 L.Ed.2d at 498-499. (Emphasis added.) (Footnote omitted.)

The narrow issue in the instant case is whether the exigent circumstances existing at the time of the fire continued to exist when Trooper Cobb returned to the structure at 9:00 a.m., after the fire had been extinguished on the prior evening, so as to permit him to enter reasonably without a warrant to determine the cause of the fire. We hold that Cobb's re-entry was a continuation of his prior, necessary entry.

In *Tyler,* the fire officials had been at the scene of the fire when it was suppressed at or about 4:00 a.m. After entering the building briefly, they had departed and left the building unattended. They returned at or about 8:00 a.m. to make a cursory examination. They left once again and returned in an hour to take samples of the flooring which had not been visible when they were first on the scene because of heat, steam and darkness. The circumstances of the case *sub judice* are similar. Trooper Cobb testified without contradiction that he had not entered the building after the fire was extinguished because of heat and dripping water. It may also be observed that his examination of the interior of the building at 9:30 p.m. would have been hampered greatly by darkness. Therefore, Cobb returned the following morning to conduct his investigation as to the origin of the fire. Although Cobb returned at a slightly later hour of the morning than the fire chief in *Tyler,* this difference is factually and legally insignificant.[3] His return on the morning after the fire had been doused, was a continuation of the right to enter lawfully in order to investigate the cause of the fire.

The result which we reach is not precluded by the decision in *Michigan v. Clifford, supra.* In that case, the property owners secured their damaged residence[4] after the

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[3] Cobb's uncontradicted testimony was that he returned to the scene of the fire at or about 9:00 a.m. There is no support in the record for the finding made by the suppression court and echoed in appellee's arguments that Cobb returned at or about 10:00 a.m. Cobb stated only that the flooring samples had been taken at about 10:00 a.m., an hour after his arrival.

[4] Although the lower interior of the structure had been extensively damaged, the exterior of the home and the upstairs rooms were largely undamaged by the fire.

fire had been extinguished, and personal belongings remained in the home. Arson investigators, who had not been present during the fire, arrived at 1:00 p.m. on the following afternoon and effected a warrantless, nonconsensual entry and search. In view of the fact that the premises had theretofore been secured, the Supreme Court concluded that there were no exigent circumstances requiring entry without a warrant. In the instant case, Cobb had been present at the time of the fire; and, because of darkness, residual heat and water, he was unable to make an immediate investigation regarding the cause of the fire. The fire-damaged premises had not been secured. Cobb's investigation, therefore, could be continued on the following morning. He could do so without first acquiring a warrant based on probable cause to believe that the owner had intentionally set the fire.

Reversed and remanded for trial. Jurisdiction is not retained.

CIRILLO, J., files a Dissenting Opinion.

J. 19063/84-1

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2954 Philadelphia 1982

COMMONWEALTH OF PENNSYLVANIA

Appellant

vs.

WALTER T. SMITH

Appeal from Suppression Order of the Court of Common Pleas, Criminal Division, of Susquehanna County, No. 1982-38.

BEFORE: CAVANAUGH, WIEAND AND CIRILLO, JJ.

FILED: AUG. 10, 1984

DISSENTING OPINION BY CIRILLO, J.

I dissent. The primary object of Officer Cobb's warrantlesss search was to gather evidence of criminal activity, not to determine the cause and origin of the recent fire. Therefore, a warrant was required showing probable cause to search the appellees' premises. Since the appellees did not give their consent to the warrantless search, and there were no exigent circumstances involved, the appellees' fourth amendment rights were violated, and the evidence obtained must be suppressed.

Exigent circumstances exist when fire officials enter a home to fight a fire. *Michigan v. Clifford,* U.S. , 104 S.Ct. 641, 78 L.Ed.2d 477 (1984). After the fire is extinguished fire officials may remain inside the premises for a reasonable period of time to investigate its cause and origin. *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *Commonwealth v. Hinkson,* Pa. Super. , 461 A.2d 616 (1982). Such investigations constitute a continuation of the first legal warrantless entry, and do not violate the fourth amendment to the Constitution since a compelling public interest is served in determining the cause and origin of fires. *Tyler* at 509, 98 S.Ct. at 1951, 56 L.Ed.2d at 498.

However, if the primary object of a warrantless search is not to determine a fire's cause, but to gather evidence of criminal activity, a continuation does not exist and it is necessary to obtain a criminal search warrant demonstrating probable cause to believe that relevant evidence will be found in the place to be searched. *Clifford* at , 104 S.Ct. at 649, 78 L.Ed.2d at 484.

Did Officer Cobb enter the appellees' burned premises to determine the cause and origin of the fire, thereby justifying a warrantless entry of the appellees' home, or did he gain entrance to gather evidence of criminal activity, thereby triggering the appellees' fourth amendment rights?

I believe the facts show that Officer Cobb entered the appellees' home to gather evidence of criminal activity. At the suppression hearing under cross-examination, Officer Cobb testified that the fire chief told him that the fire was suspicious in origin. S.T. 11. The fire chief thought the fire suspicious because the electricity had been turned off.

Id. at 12. Cobb further stated that the term "suspicious in origin" usually referred to an arson fire. *Id.* Cobb himself suspected arson. *Id.* at 13. Cobb's testimony supports the inference that he entered the appellees' home to search for evidence of arson.

More than twelve hours elapsed from the time the firemen extinguished the blaze to the time when Officer Cobb conducted his warrantless search. Cobb could have easily obtained a warrant from a magistrate on the way to the appellees' premises. In fact, Cobb testified that he travelled right past the magistrate's office on his way to make the warrantless search.

Since Officer Cobb's search was conducted without a valid warrant, without the consent of the appellees, and without the exigent circumstances necessary to support a warrantless search, it was invalid under the fourth and fourteenth amendments. Any evidence obtained as a result of this entry must, therefore, be excluded at the appellees' trial.

The majority's holding to the contrary allows fire officials to circumvent the warrant requirement by making every investigation into criminal activity at the scene of a fire an investigation of the cause and origin of the fire. The Supreme Court in *Tyler* and *Clifford* did not intend to further erode the warrant requirement of the Constitution in the manner accomplished by the holding of the majority in the present case.

I would affirm the suppression order of the trial court.

Order, Court of Common Pleas

IN THE COURT OF COMMON PLEAS
SUSQUEHANNA COUNTY, PENNA.

No. 1982-38

COMMONWEALTH OF PENNSYLVANIA

vs.

WALTER T. SMITH

ORDER

NOW TO WIT, this 14th day of October, 1982 the evidence and photographs taken inside the house and samples taken on 29 June, 1982 by Officer Cobb are inadmissible and that evidence is hereby suppressed.

The record of this proceeding is to be impounded by the Prothonotary. No one is to divulge any of the proceedings that we have taken without permission of the Court, except to the parties or to their attorneys.

BY THE COURT
(s) Donald O'Malley
P.J.

IN THE COURT OF COMMON PLEAS
SUSQUEHANNA COUNTY, PENNA.

No. 1982-38

COMMONWEALTH OF PENNSYLVANIA

vs.

WALTER T. SMITH

OPINION

The Defendant, Walter T. Smith was charged with the arson of his own home. An Omnibus Motion for relief contained a motion to suppress evidence collected by Raymond C. Cobb, Pennsylvania State Policeman. A hearing was held prior to trial and the Court suppressed the evidence obtained by Mr. Cobb. Counsel excepted and the Court approves the appeal of its decision because the suppressed evidence may be crucial to the Commonwealth's case.

HISTORY OF THE CASE

On the 28th day of June, 1982, Raymond C. Cobb, Pennsylvania State Police, was on regular patrol when it came to his attention that the residence of Walter T. Smith,

Borough of Great Bend, Susquehanna County, Pennsylvania was on fire. He proceeded to the scene of the fire to assist in the direction of travel. The house was engulfed in flames when he arrived. Trooper also serves as Fire Marshall for Susquehanna County. During the time he was at the scene, the Fire Chief suggested to him that the fire was of suspicious origin and that electric power to the burning house had been cut that day, so that there was no electric current in the house at the time the fire broke out. Trooper Cobb remained at the site until the fire was suppressed, and did observe the building through open windows and doors, but did not enter. At that time he met co-owner, Sherry Lee Smith and he advised her he would be investigating the premises later.

Officer Cobb left the State Police Barracks in Gibson, Pennsylvania at 9:00 A.M. the next day in his role as Fire Marshall, passed through the Borough of New Milford and the office of a Magistrate on his way to Great Bend. He did not obtain a search warrant. He entered the building, took pictures of burned patterns and collected samples. While Officer Cobb was in the building, the Defendant, Co-owner, Walter Smith appeared and offered to assist Officer Cobb.

The Court made the following findings of fact and Conclusions of Law at the Suppression Hearing.

NOW TO WIT, 14 October, 1982 at approximately 10:24 A.M. after a Suppression Hearing before the Court which was attended by the prosecutor, District Attorney, Defendant and his attorneys, Paul Mazzoni, Robert Mazzoni and Michael Giangrieco and Law Clerk Dennis Mark, the Court makes the following Findings of Fact:

1. The residence of Walter T. Smith, Defendant located in the Borough of Great Bend, Susquehanna County, PA was engulfed of flames on 28th day of June, 1982.

2. The fire was extinguished at approximately 10:00 P.M. on the same day.

3. Officer Raymond C. Cobb, Pennsylvania State Police, prosecutor in this case was present during the time of the blaze.

4. Officer Cobb on that occasion met co-owner, wife of the Defendant, Sherry Lee Smith, and he advised her he would be investigating the premises later.

5. Officer Cobb returned in his role as Fire Marshall at approximately 10:00 A.M. on the 29th of June, 1982.

6. He entered the building, collected floor samples, and took pictures of the interior.

7. The Defendant, Walter T. Smith appeared on the scene while Officer Cobb was present in the building, the Defendant volunteered to assist the officer.

8. The Defendant filed an Omnibus Motion to suppress what evidence was obtained by Officer Cobb in this case.

CONCLUSIONS OF LAW

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1. The statement of wife at the scene of the fire was too confused to find that she had granted permission to enter and search the building to anybody.

2. At the time the Defendant appeared on the 29th of June, 1982, Officer Cobb had already entered the building without his permission, and whatever was said, could not have been interpreted as a waiver of the Defendant's Fourth Amendment Right.

3. At the time of the entry there were no exigent circumstances and the investigating officer was required to have a search warrant properly issued by a Magistrate.

BY THE COURT
(s) Donald O'Malley
P.J.

Supreme Court, U.S.
FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-295

In the Supreme Court of the United States

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Respondent

vs.

WALTER T. SMITH,
Petitioner

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth and Fourteenth Amendments of the United States Constitution would require a Pennsylvania State Fire Marshal to obtain a search warrant to enter, search and seize evidence from a dwelling house significantly damaged by fire in the nighttime when such reentry was done in the early morning hours thereafter?

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OPINIONS BELOW

The opinions below are as set forth in the Petition for Writ of Certiorari filed by the Petitioner prior hereto.

JURISDICTION

Jurisdiction is as set forth in the Petition for Writ of Certiorari filed by the Petitioner.

CONSTITUTIONAL PROVISIONS

The Constitutional provisions are as set forth in the Petition for Writ of Certiorari filed by the Petitioner.

COUNTER-STATEMENT OF THE CASE

On the evening of the 28th day of June, 1982, Raymond C. Cobb, Pennsylvania State Police, was on regular patrol when it came to his attention that the residence of Walter T. Smith, Borough of Great Bend, Susquehanna County, Pennsylvania, was on fire. He proceeded to the scene of the fire to assist in the direction of traffic. The house was engulfed in flames when he arrived. Trooper Cobb also serves as Fire Marshal for Susquehanna County. During the time he was at the scene, the Fire Chief suggested to him that the fire was of suspicious origin and that electric power to the burning house had been cut that day, so that there was no electric current in the house at the time the fire broke out. Trooper Cobb remained at the site until the fire was suppressed at 10:00 p.m. and did observe the building through open windows and doors, but did not enter. At that time he met co-owner, Sherry Lee Smith, and he advised her he would be investigating the premises later.

Officer Cobb left the State Police Barracks in Gibson, Pennsylvania at 9:00 a.m. the next day in his role as Fire Marshal, passing through the Borough of New Milford and the office of a Magistrate on his way to Great Bend. He did not obtain a search warrant. He entered the building at approximately 10:00 a.m., took pictures of burned patterns and collected samples. While Officer Cobb was in the building, the Defendant, co-owner Walter Smith, appeared and offered to assist Officer Cobb.

Counter-Statement of the Case

As a result of evidence obtained, the Defendant was charged with the following crimes: Arson, 3301 (b) (2) (3) and Risking Catastrophe, 18 C.S.A. 3302 (b).

Prior to trial Smith moved to suppress the photographs taken by Trooper Cobb and the samples obtained claiming his Fourth Amendment rights were violated.

The trial Court granted the Suppression Motion to which the Commonwealth appealed to the Superior Court of Pennsylvania.

That Court reversed the trial Court by a decision that found the search and seizure constitutional. This decision was appealed to the Supreme Court of Pennsylvania by the Defendants. The Supreme Court of Pennsylvania affirmed the decision of the Superior Court by a decision that found the search and seizure to be constitutional.

This appeal follows.

ARGUMENT

The issue raised in this appeal relates to the examination of a premises by a fire marshal which, under the decisions of *Michigan v. Tyler, et al.*, 436 U.S. 499, 92 S.Ct. 1941, 56 L.Ed. 2d 486 (1978) and *Michigan v. Clifford*, 104 S.Ct. 641, 78 L.Ed. 2d 477 (1984), involves considerations beyond those usually associated with the "ordinary" search and seizure case where the presence or absence of probable cause is most frequently litigated.

While all of the well known Fourth Amendment principles and doctrines developed over the years by this Honorable Court are applicable, see e.g. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971) and the numerous cases cited therein, the term "exigent circumstances" as refined in *Tyler* and *Clifford*, supra, is of the greatest importance to "fire investigation" cases such as this case. "Exigent circumstances" is, in fact, the *only* realistic authority for any fire marshal to make any investigation of any recently burned building to investigate the causes and origin of a fire and, thereafter, prosecute an owner thereof for arson to defraud an insurance company or for risking a catastrophe.

Almost *never*, within a few hours of a fire, will sufficient information be known to sustain a finding of "probable cause" in support of an application for a search warrant. As such, if any fire marshal is going to be authorized to reenter a very recently burned structure without violating the owner's rights under the Fourth Amendment, such reentry must be under "exigent circumstances" in order to meet the Fourth Amendment standards.

Argument

From the above, it is submitted that the question raised before this Court by the Petitioner goes directly to the adequacy of the definition of "exigent circumstances" as previously set down by this Honorable Court in the cases of *Michigan v. Tyler*, supra, and *Michigan v. Clifford*, supra.

In the context of a fire investigation, the criterion has been stated as:

> "... [O]fficials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional."

Tyler, supra, 436 U.S. 510, 98 S.Ct. 1950. As to the length of the reasonable time after a *nighttime* blaze is extinguished (such as the one in the present matter), the Supreme Court in *Michigan v. Tyler*, supra, found the "next morning" sufficient to be a continuation as opposed to a separate search. The *Clifford* decision later defined the "end" of the continuation criteria by finding a search by a *different investigator the next afternoon* without notice of intent to investigate to be beyond the definition of a continuation of the initial exigent circumstance.

It is respectfully submitted that, in these two decisions, the Supreme Court set down a definition of the circumstances under which exigent circumstances do and do not exist in language amply clear to allow for its application by the various Courts relying thereupon for guidance as the present case demonstrates and needs no further consideration by this Court at this time.

Argument

It is further submitted that the Pennsylvania Supreme Court's application of this Court's definition of "exigent circumstances" in the case now before this Court was totally consistent therewith and should not be disturbed.

"Reasonable Suspicion Is NOT Probable Cause"

Appellant relies heavily upon the fact that the Fire Marshal drove past the Magistrate's Office on his way to conduct his investigation and "could have" obtained a search warrant. As is well known, no search warrant can issue absent *probable cause*. The high water mark of the Fire Marshal's knowledge here constituted "probable *suspicion*". As such, he could never have obtained a search warrant under the historic interpretations of the Fourth Amendment known to even the most casual student of the Constitution. Certainly the Petitioner does not seek a ruling by this Court that extends the "reasonable suspicion" doctrine of *New Jersey v. T.L.O.* 469 U.S. , 105 S.Ct. , 83 L.Ed. 2d 720 (1985) to private dwellings even when to do so would assist law enforcement authorities in their efforts to investigate and prosecute those who would intentionally burn their own structures to defraud insurance companies at great danger to innocent human life and other property.

No "Racing Event" Is Created

Petitioner further argues that the present criteria as established by the Supreme Court of the United States

create a situation where a "race" to a structure recently destroyed by fire is created between the fire marshal and the owner. This argument can be answered in several ways. In the first place, the "swing decision" of Mr. Justice Stevens, in the *Clifford* decision, supra, pointed out at least four different places that prior notice of the intent to examine the premises was part of the criteria for a lawful reentry by a fire marshal. Such prior notice of intent to reenter is hardly the usual manner of conducting a "race" as the term is urged by the Petitioner here. Note that in this case prior notice was given to the co-owner of the home even while the fire still burned.

Further, under the criteria established, the Fire Marshal's reentry must be as soon as humanly feasible to be constitutional. Note that in *Tyler* a reentry in the early morning after a nighttime fire was valid, while in *Clifford* a search in the very early afternoon of the day after a nighttime fire was not constitutional, even though the fire marshal "won" whatever "race" had been conducted.

Maybe some critic of the criterion can argue that it creates a "race" of some kind. However, where the fire marshal is limited by the severity of the fire in the first place, and the very limiting criteria of *Clifford* in the second (maybe 6 hours after daybreak), and is required to give prior notice to the landowner before he even starts, the situation can hardly be described as the type of "race" that would suggest that the fire marshal is taking any unfair or unconstitutional advantage of the situation.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari in the above captioned matter should be denied.

Respectfully submitted,

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